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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 SPACE DATA CORPORATION,

18 Plaintiff,

19 v.

20 ALPHABET INC., GOOGLE LLC, AND
21 LOON LLC,

22 Defendants.
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Case No. 5:16-cv-03260-BLF

**MOTION TO QUASH TRIAL
SUBPOENAS**

Date: July 19, 2019
Time: 9:00 a.m.
Judge: Hon. Beth Labson Freeman
Dept: Courtroom 3 – Fifth Floor

Date Filed: June 13, 2016

Trial Date: August 5, 2019

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on July 19, 2019, at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 3, 5th Floor, of the United States District Court for the Northern District of California, 280 South 1st Street, San Jose, California, 95113, Movants Alphabet Inc., Google LLC, and Loon LLC (collectively “Google”) will, and hereby do, move the Court for an order quashing Plaintiff Space Data Corporation’s subpoenas served on Larry Page and Sergey Brin on March 6, 2019 and July 23, 2018, respectively (“the Subpoenas”). This motion is based on this submission, the accompanying declarations and exhibits, the pleadings and other documents on file in this case, and any argument presented to the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Google’s co-founders Larry Page and Sergey Brin agreed to sit for 3.5 hours of deposition each in this case. As their deposition testimony made clear, neither co-founder possesses any unique information related to Plaintiff Space Data Corporation’s claims in this case. Space Data apparently reached the same conclusion, as it only utilized about 2.25 hours for Mr. Page’s deposition and about 1.25 hours for Mr. Brin’s deposition. Nonetheless, Space Data now seeks to compel the appearance at trial of both Mr. Page and Mr. Brin, the Chief Executive Officer and President, respectively, of Alphabet, Inc., Google’s parent company. This effort is unwarranted and inappropriate.

Courts routinely bar litigants from forcing the most senior corporate executives to testify unless they can demonstrate that the prospective witnesses possess unique first-hand knowledge that cannot be obtained through less burdensome means. Space Data cannot satisfy that high standard here. Neither Mr. Page nor Mr. Brin has unique knowledge beyond what is available in their depositions or the testimony of other current and former Google employees. As such, Space Data’s attempt to force Mr. Brin and Mr. Page to appear at trial is nothing more than a tactic for leverage and harassment. Forcing them at trial to simply repeat their deposition testimony, which will in turn merely duplicate the testimony of others, would impose an undue burden on Google.

Accordingly, the Court should quash the trial subpoenas issued to Mr. Brin and Mr. Page.

II. COURTS APPLY HEIGHTENED SCRUTINY WHEN CONSIDERING REQUESTS TO EXAMINE TOP-RANKING CORPORATE EXECUTIVES

Litigants seeking to examine a corporation's most senior executives ("apex executives") must show that they have exhausted other, less intrusive methods of procuring the information at issue, and that the subpoenaed parties have "unique first-hand, non-repetitive knowledge of the facts at issue in the case." *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012); *see also Robertson v McNeil-PPC Inc.*, No. LA CV11-09050 JAK (SSx), 2014 WL 12576817, at *18 (C.D. Cal. Jan. 13, 2014) ("When a high-ranking executive 'removed from the daily subjects of the litigation has no *unique* personal knowledge of the facts at issue, a deposition of the official is improper.") (quoting *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374 MMC (JL), 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) (emphasis added)).

Extra protection is justified by courts' recognition that forcing apex executives to spend time away from their responsibilities to provide testimony imposes a significant burden on their companies. Thus, the power to compel the testimony of apex executives "creates a tremendous potential for abuse or harassment that may require the court's intervention." *K.C.R. v. Cty. of Los Angeles*, No. CV 13-3806 PSG (SSx), 2014 WL 3434257, at *3 (C.D. Cal. Jul. 11, 2014) (citation omitted); *see also Robertson*, 2014 WL 12576817, at *17; *Celerity*, 2007 WL 205067, at *3; *Consol. Rail Corp. v. Primary Indus. Corp.*, Nos. 92 Civ. 4927 & 92 Civ. 6313, 1993 WL 364471, at *1 (S.D.N.Y. Sept. 10, 1993) (high-ranking executives afforded extra protection based on the recognition that "permitting unfettered discovery of corporate executives would threaten disruption of their business and could serve as a potent tool for harassment in litigation").

Although the apex doctrine is most frequently applied in the deposition context, its rationale applies with equal force to trial testimony. *See, e.g., In re Levaquin Prods. Liability Litig.*, MDL No. 08-1943 (JRT), 2010 WL 4867407, at *2 (D. Minn. Nov. 9, 2010) (precluding trial testimony of Johnson & Johnson's CEO because it was unclear why other witnesses "could not provide the information [defendants] seek"); *Amazon.com, Inc. v. Comm'r of Internal Revenue*, No. 31197-12 2014 WL 6980512, at *3 (T.C. 2014) (barring respondent from

1 compelling the trial testimony of Amazon's Chairman and CEO, Jeff Bezos). Indeed, trial
2 scheduling is often more complicated.

3 **III. MR. PAGE AND MR. BRIN DO NOT HAVE UNIQUE, FIRST-HAND**
4 **KNOWLEDGE TO OFFER AT TRIAL AND THE SUBSTANCE OF THEIR**
5 **TESTIMONY COULD BE OBTAINED THROUGH LESS BURDENSOME**
6 **MEANS**

7 Space Data took the depositions of both Mr. Page and Mr. Brin, which made clear that
8 Google's co-founders have no unique, first-hand knowledge of facts relevant to this case. In fact,
9 notwithstanding that Space Data negotiated for 3.5 hours of testimony from each of Mr. Page and
10 Mr. Brin, Space Data chose not to exhaust the time allotted in either deposition. Mr. Page's
11 deposition lasted just 2.25 hours, and Mr. Brin's 1.25 hours. Declaration of Andrew Bruns in
12 Support of Motion to Quash Trial Subpoenas ("Bruns Decl.") ¶ 3. Moreover, before the
13 conclusion of Mr. Brin's deposition, defense counsel noted that Mr. Brin might not be available
14 to testify at trial and that Space Data should ask any further questions that it had. Space Data's
15 counsel still declined to continue questioning. Bruns Decl., Ex. 1 at 66:13-67:20. Presumably,
16 Space Data was able to get answers to whatever it legitimately needed from these executives.

17 More than a year later, Space Data's Witness List identifies a laundry list of issues about
18 which it anticipates asking Google's founders at trial. For Mr. Page, for example, this list reads as
19 follows:

20 *Mr. Page is Google's co-founder, Chief Executive Officer of Alphabet Inc., and*
21 *former Google C.E.O. Mr. Page may testify about meetings with SDC and*
22 *Google's February 2008 tour; knowledge of photos taken but not emailed or*
23 *posted "for obvious reasons" but put on the wiki; discussions, emails, analyses,*
24 *meetings and communications regarding SDC and SDC balloon technology;*
25 *meetings, emails and communications with Richard DeVaul, Astro Teller, Sergey*
26 *Brin, Sebastian Thurn, Phil Gossett and other Google employees re: Loon*
27 *development; meetings, emails and communications with Anne Bray and others*
28 *regarding Loon's commercial viability and success; the "X" Hot List;*
"unconventional use cases"; conclusions on how Google could use SDC
technology; the spectrum survey; decision to greenlight DeVaul's idea and
funding; communications with Dylan Casey to roll-out an SDC constellation in
2008; Loon strategy, roll-out and practices; Loon projections and financials;
Alphabet and Google financials; documents on the exhibit list that are either
authored by or were sent to him and any subjects covered in his deposition.

Id., Ex. 2 at 8.

1 None of these topics are ones for which Mr. Page possesses unique, first-hand knowledge.
2 The same is also true of the topics Space Data has identified for Mr. Brin. The topics associated
3 with Mr. Page and Mr. Brin overlap significantly with the anticipated testimony of other
4 witnesses who could cover the topics just as well. For instance, to the extent that Mr. Page and
5 Mr. Brin are being asked to testify about Google representatives' February 2008 visit to Space
6 Data's offices, those facts can be introduced by any of the four other current and former Google
7 employees who went on the trip that Space Data intends to call at trial (Larry Alder, Daniel
8 Conrad, Minnie Ingersoll, and Daniel McCloskey). *See id.*, Ex. 2. Indeed, Space Data's witness
9 list indicates that it intends to elicit the same information from these four other witnesses about
10 Google's February 2008 visit to Space Data. *Id.* Each of these four other witnesses is equally if
11 not better equipped to testify about that visit than either Mr. Page or Mr. Brin.

12 The same can be said for the topics that Space Data has identified as unique to Mr. Page
13 and Mr. Brin. For example, only Mr. Page and Mr. Brin have been identified as testifying about
14 "Loon strategy, roll-out and practices." *Id.* But Mr. Page and Mr. Brin do not now, nor have they
15 ever, worked on the development and day-to-day operations of Loon. Their involvement is
16 primarily indirect oversight as supervising apex executives, to whom hundreds of projects report.
17 Several of the witnesses that Space Data plans to call are far more intimately involved with
18 Loon's development and operations during the relevant period, including Astro Teller and
19 Richard DeVaul.

20 In short, Space Data could get the same information it hopes to glean from Mr. Page and
21 Mr. Brin from other witnesses who are at least as knowledgeable as them about the subject
22 matter. *See, e.g., Salter v. Upjohn Co.*, 593 F.2d 649, 652 (5th Cir. 1979) (upholding protective
23 order precluding the deposition of the president of the Upjohn Company, and directing the
24 plaintiff to depose lower-level employees with more direct knowledge of the facts); *In re*
25 *Levaquin*, 2010 WL 4867407 at *2; *Baine v. General Motors, Corp.*, 141 F.R.D. 332, 334--35
26 (M.D. Ala. 1991) (precluding testimony of corporate vice president after finding it has "not been
27 demonstrated that [the executive] has any superior or unique personal knowledge [of the relevant
28 issues in the case]"). And to the extent Space Data believes that Mr. Page and Mr. Brin do possess

1 unique, relevant knowledge, Space Data may play portions of their videotaped deposition
2 testimony at trial.

3 **IV. FORCING MR. PAGE AND MR. BRIN TO TESTIFY WOULD IMPOSE AN** 4 **UNDUE BURDEN ON GOOGLE**

5 Courts closely scrutinize requests to examine top-level executives in part to protect
6 against harassment. Because of the substantial burden that apex witness testimony places on
7 companies, such examination “creates a tremendous potential for abuse or harassment.” *Celerity*,
8 2007 WL 205067 at *3 (barring defendants from deposing plaintiff’s CEO and Executive
9 Chairman). Forcing Mr. Page and Mr. Brin to testify at trial in this case would impose a
10 significant, undue burden on Google. Given these witnesses’ lack of unique knowledge and the
11 availability of video deposition testimony, Space Data’s effort to compel trial testimony amounts
12 to little more than harassment.

13 Requiring the most senior leadership of a large company to testify is unduly burdensome,
14 especially where, as here, other witnesses are available to cover the same topics. *See*
15 *Amazon.com*, 2014 WL 6980512 at *4; *see also Plew v. Limited Brands, Inc.*, No. 08 Civ. 3741,
16 2012 WL 379933, at *3 (S.D.N.Y. Feb. 6, 2012) (granting defense motion to prevent plaintiff
17 from calling Victoria’s Secret CEO as a trial witness where the plaintiff had deposed two senior
18 executives with knowledge of the product).

19 The weight of the responsibilities borne by Mr. Page and Mr. Brin as apex executives is a
20 factor courts routinely consider in deciding whether the necessity of their testimony outweighs the
21 burden of testifying. *See, e.g., WebSide Story, Inc. v. NetRatings, Inc.*, No. 06cv408 WQH(AJB),
22 2007 WL 1120567, at *5 n.10 (S.D. Cal. April 6, 2007) (“[A] court must remain mindful that
23 permitting unfettered discovery of corporate executives would threaten disruption of their
24 business.”) (quoting *Tri-Star Pictures, Inc. v. Unger*, 171 F.R.D. 94, 102 (S.D.N.Y.1997)))
25 (citations omitted). This burden is amplified where, as here, apex executives have already borne
26 the burden of deposition. *Cf. Tri-Star Pictures, Inc.*, 171 F.R.D. at 102–03 (noting “the burdens
27 which appearing for a deposition can impose upon a [previously-deposed] senior corporate
28 executive” and “strictly confin[ing]” the scope of further deposition).

1 The evidentiary record shows that the burden of requiring Mr. Page and Mr. Brin to
 2 appear at trial is not warranted here. Given the availability of their videotaped deposition
 3 testimony, the availability of other witnesses to testify to the 2008 visit, and the lack of
 4 involvement of Mr. Page or Mr. Brin in the day-to-day operations of Loon, Plaintiff's attempt to
 5 require Mr. Page and Mr. Brin to testify at trial can only be explained as an effort to harass and
 6 burden Google. Such a burden is particularly unwarranted in this case, given that Space Data's
 7 own expert calculated its damages at [REDACTED] Bruns Decl., Ex. 3 ¶ 217.¹

8 **V. CONCLUSION**

9 Because Plaintiff's attempt to compel trial testimony of Mr. Page and Mr. Brin would not
 10 elicit unique evidence that cannot be obtained from other sources, including their videotaped
 11 depositions and other Google employees, Google respectfully asks the Court to quash the trial
 12 subpoenas to Mr. Page and Mr. Brin.

13
 14
 15 Dated: July 11, 2019

KEKER, VAN NEST & PETERS LLP

16
 17 By: /s/ Matthew M. Werdegar

18 ROBERT A. VAN NEST
 19 MATTHEW M. WERDEGAR
 20 EUGENE M. PAIGE
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 24 SHAYNE HENRY
 25 ANDREW S. BRUNS

26
 27 ¹ Dr. Meyer's report calculated Space Data's trade secret damages as [REDACTED], but Space
 28 Data has since abandoned one of its trade secret claims, which Dr. Meyer valued at [REDACTED].
 See ECF 439-5 at 14 n. 1 (Space Data Opp. to Google MSJ)